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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

10 UNITED STATES OF AMERICA, | CASE NO. 10cr4142 JM
11 v. Plaintiff, | ORDER DENYING MOTION FOR
12 ERNESTO GUTIERREZ-CORTEZ | REDUCTION OF SENTENCE
13 (2),
14 Defendant.

Defendant Ernesto Gutierrez-Cortez moves for a reduction of his sentence pursuant to 18 U.S.C. §3582(c)(2) and Amendment 782 to the United States Sentencing Guidelines (“USSG”). The Government opposes the motion. Pursuant to Local Rule 7.1(d)(1), the court finds the matters presented appropriate for resolution without oral argument. For the reasons set forth below, the court denies the motion for reduction of sentence.

BACKGROUND

22 On October 14, 2010, the United States filed a three-count indictment charging
23 Defendant with (Count 1) Conspiracy to Distribute approximately 1.36 kilograms of
24 methamphetamine, in violation of 21 U.S.C. §§ 841 and 846; (Count 2) Distribution
25 of Methamphetamine (approximately .4 kilograms), in violation of 21 U.S.C.
26 § 841(a)(1); and (Count 3) Possession of Methamphetamine with Intent to Distribute
27 (approximately .9 kilograms), in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.
28 On June 23, 2011, Defendant pled guilty to Count Two, and on February 2, 2012, the

1 Court sentenced him to 87 months custody, followed by 5 years of supervised release.

2 To arrive at this sentence, the Court calculated a base offense level of 34, based
 3 upon 432.4 grams of actual methamphetamine, reduced 3 levels for Acceptance of
 4 Responsibility, departed 2 levels for Fast Track under § 5K2.0, and then varied an
 5 additional 4 levels under 28 U.S.C. §3553(a). Defendant's criminal history Category
 6 was IV, and at a guideline level of 25, his sentencing range was 84-105 months. The
 7 Court then imposed a custodial sentence of 87 months.

8 DISCUSSION

9 Under 18 U.S.C. § 3582(c)(2), district courts have the authority to modify a term
 10 of imprisonment when a defendant was sentenced based on a guideline range that is
 11 subsequently lowered by amendment to the USSG. When determining whether a
 12 sentencing adjustment is warranted pursuant to § 3582(c)(2), the court must "determine
 13 the amended guideline range that would have been applicable to the defendant if the
 14 amendment(s) ... had been in effect at the time the defendant was sentenced." USSG
 15 § 1B1.10(b)(1). "The court shall substitute only the [applicable amendment] for the
 16 corresponding guideline provisions that were applied when the defendant was
 17 sentenced and shall leave all other guideline application decisions unaffected." *Id.* If
 18 the amendment does not lower the guideline range under which the defendant was
 19 sentenced, a reduction in sentence is not authorized. USSG § 1B1.10(a)(2).

20 Amendment 782 modified the Drug Quantity Table in USSG § 2D1.1, which
 21 provides the base offense levels for different quantities of various controlled
 22 substances. Amendment 782 reduced the base offense levels for most federal drug
 23 trafficking crimes by two levels. In July 2014, the U.S. Sentencing Commission
 24 promulgated Amendment 788 and amended USSG § 1B1.10, which made Amendment
 25 782 retroactive (effective November 1, 2014) but delayed until November 1, 2015 the
 26 effective date for orders reducing prison terms based on Amendment 782.

27 "[T]he court shall not reduce the defendant's term of imprisonment under
 28 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the

1 minimum of the amended guideline range determined under subdivision (1) of this
 2 subsection." USSG § 1B1.10(b)(2)(A). The commentary to § 1B1.10 clarifies that the
 3 "[e]ligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an
 4 amendment listed in subsection (d) that lowers the applicable guideline range (i.e., the
 5 guideline range that corresponds to the offense level and criminal history category
 6 determined pursuant to §1B1.1(a), which is determined before consideration of any
 7 departure provision in the Guidelines Manual or any variance)." USSG § 1B1.10 cmt.
 8 n.1(A).

9 In Dillon v. United States, 130 S. Ct. 2683, 2691 (2010), the Supreme Court
 10 explained the limited nature of § 3582(c)(2) proceedings and the process for ruling on
 11 motions to reduce sentences under that section.

12 Consistent with the limited nature of §3582(c)(2) proceedings, §1B1.10(b)(2) also confines the extent of the reduction authorized. Courts
 13 generally may "not reduce the defendant's term of imprisonment under
 14 18 U. S. C. §3582(c)(2) . . . to a term that is less than the minimum of the
 15 amended guideline range" produced by the substitution. §1B1.10(b)(2)(A). Only if the sentencing court originally imposed a term
 16 of imprisonment below the Guidelines range does §1B1.10 authorize a court proceeding under §3582(c)(2) to impose a term "comparably" below
 the amended range. §1B1.10(b)(2)(B).

17 The Supreme Court required district courts to follow a two-step process in ruling on
 18 motions under § 3582(c)(2). The Supreme Court cautioned that "[f]ollowing this
 19 two-step approach, a district court proceeding under §3582(c)(2) does not impose a
 20 new sentence in the usual sense." Id. Furthermore, "proceedings under 18 U.S.C.
 21 § 3582(c)(2) and this policy statement do not constitute a full resentencing of the
 22 defendant." USSG § 1B1.10(a)(3). The two-step process provided by Dillon, 130 S. Ct.
 23 at 2691-92, is as follows:

24 At step one, §3582(c)(2) requires the court to follow the Commission's
 25 instructions in § 1B1.10 to determine the prisoner's eligibility for a
 26 sentence modification and the extent of the reduction authorized.
 27 Specifically, § 1B1.10(b)(1) requires the court to begin by "determin[ing]
 28 the amended guideline range that would have been applicable to the
 defendant" had the relevant amendment been in effect at the time of the
 initial sentencing. "In making such determination, the court shall
 substitute only the amendments listed in subsection (c) for the
 corresponding guideline provisions that were applied when the defendant
 was sentenced and shall leave all other guideline application decisions

unaffected.” At step two of the inquiry, §3582(c)(2) instructs a court to consider any applicable §3553(a) factors and determine whether, in its discretion, the reduction authorized by reference to the policies relevant at step one is warranted in whole or in part under the particular circumstances of the case. Because reference to §3553(a) is appropriate only at the second step of this circumscribed inquiry, it cannot serve to transform the proceedings under §3582(c)(2) into plenary resentencing proceedings.

The district court’s discretion at step two is limited. See Freeman v. United States, 131 S. Ct. 2685, 2693 (2011) (Noting that “[t]he binding policy statement governing §3582(c)(2) motions places considerable limits on district court discretion”). In Freeman, the Supreme Court further explained that “[i]n an initial sentencing hearing, a district court can vary below the Guidelines; but, by contrast, below-Guidelines modifications in §3582(c)(2) proceedings are forbidden, USSG §1B1.10(b)(2)(A), except where the original sentence was itself a downward departure [pursuant to] §1B1.10(b)(2)(B).” Freeman at 2693. As a result, this Court is not permitted to engage in a de novo resentencing in a § 3582(c)(2) proceeding and therefore, cannot grant the same departures or variances granted at the initial sentencing hearing, unless that departure was granted pursuant to a government’s motion for substantial assistance as defined by the Guidelines.

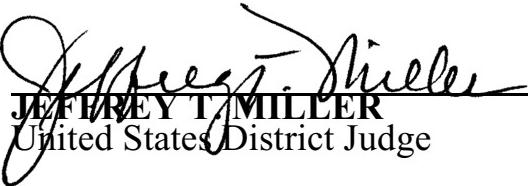
Here, under the Amended Guidelines, the base offense level for 432.4 grams of actual methamphetamine is level 32. After a reduction for Acceptance of Responsibility (-3) the amended adjusted offense level is 29. With Criminal History Category of IV, the guideline range is 121 to 151 months. As the original sentence included a Fast Track Departure of 2 levels and a §3553(a) variance of 4 levels, the amended guideline range is not lower than the 87 month sentence actually received by Defendant. Accordingly, Defendant is not entitled to any relief as the original sentence is less than the Amended Guideline range.

In sum, the court denies the motion for a reduction in sentence.

IT IS SO ORDERED.

DATED: November 30, 2016

cc: All parties



JEFFREY T. MILLER
United States District Judge